

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

**REPLY COMMENTS OF THE  
NEBRASKA PUBLIC SERVICE COMMISSION**

INTRODUCTION

The Nebraska Public Service Commission (NPSC) respectfully submits these Reply Comments in response to the Federal Communications Commission's (FCC or Commission) March 10, 2004 Notice of Proposed Rulemaking in the above-captioned docket (*NPRM*). In the *NPRM*, the Commission sought comment on issues pertaining to the appropriate legal and regulatory framework for IP-Enabled Services. The NPSC filed initial comments on May 28, 2004. The NPSC is mainly concerned with the Commission's treatment of Voice over Internet Protocol (VoIP) services.

Jurisdiction

The Commission seeks comment on the jurisdictional nature of IP-enabled services.<sup>1</sup> Many commenters argue that the Commission should take exclusive federal jurisdiction over IP-Enabled services, including VoIP claiming that state regulation would thwart the Commission's goals.<sup>2</sup> Such an argument overlooks the fact that most, if not all, state commissions are embracing the emergence of VoIP and other new technologies.<sup>3</sup> Generally, state commissions

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<sup>1</sup> *NPRM*, ¶ 38.

<sup>2</sup> See, e.g., Comments of Net2Pone, Inc., Verizon, SBC, Qwest, and Nuvio.

<sup>3</sup> See, e.g., Comments of the Public Utilities Commission of Ohio at 2, and, Initial Comments of the Montana Public Service Commission at 1.

have taken the position that regulatory purview would reach *only as far as necessary* to protect public welfare, consumer rights, local interests, promote competition in a competitively neutral manner, and preserve universal service.

The NPSC does not believe that the Commission has a clear basis to claim exclusive federal jurisdiction over VoIP services. Rather, the statutory framework of the Act plainly indicates that states have a role to play in overseeing competitive entry in the communications marketplace and in protecting consumers.<sup>4</sup> Significant regulatory powers are reserved to the states, particularly as it relates to consumer protection and universal service. As authorized by the Act, states have the authority to promulgate public safety regulations so long as they are competitively neutral and this authority is reserved from the circumstances in which the FCC can preempt action.<sup>5</sup> The authority is preserved in § 253 (b) requirements to maintain openness and public safety and welfare. Only that which was either expressly provided in the Act or exhibits implicit conflict between state and federal law can be preempted by the federal government.<sup>6</sup> Neither exists with regard to VoIP.

Moreover, as a matter of public policy states should not be deprived of their ability to protect consumers, and promote local interests. States have a significant interest in preserving universal service, encouraging rapid deployment of broadband, and protecting the welfare of consumers.

The Commission should exercise Title II jurisdiction over IP Enabled services having the characteristics of “telecommunications services.” In the event the Commission believes it is appropriate, the Commission could waive certain requirements, on a case-by-case basis, or exercise forbearance when the requirements of 47 U.S.C. § 160 have been met. The NPSC

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<sup>4</sup> See 47 U.S.C. § 253(b).

<sup>5</sup> See Comments of the National Association of Regulatory Utility Commissioners (NARUC) at 10.

<sup>6</sup> See Public Utilities Commission of Ohio at 22-24.

believes characterizing all IP Enabled services into the Commission's Title I ancillary jurisdiction would be overly broad, and contrary to public interest.

As an alternative, the *NPRM* implies, the “mixed use” doctrine could be applied by the Commission to VoIP services.<sup>7</sup> Application of this doctrine should be reserved when all other alternatives have been examined and found impracticable. The “mixed use” doctrine should not be used as a justification for preemption of state authority. Such a determination could have a dire impact on state universal service programs, TRS programs, and public safety regulations. Methods to identify the traffic or allocation factors should be considered first. Further, there are multiple commenters who argue that VoIP intrastate calls could be distinguished from VoIP interstate calls.<sup>8</sup> Although the user may be mobile, similar impediments have existed with identifying wireless communications.<sup>9</sup> The Commission could apply a proxy similar to the interstate usage factors and inter MTA factors used to determine the jurisdiction of interexchange and wireless telecommunications traffic to IP enabled services.<sup>10</sup> Other possible methods include point of interconnection or the location of the NPA NXX and the physical location of the NANP.<sup>11</sup>

### Regulatory classification

The Commission also sought comment on how, it should differentiate among various IP-Enabled services to ensure that any regulations applied to the services are limited to those cases in which they are appropriate.<sup>12</sup> As a policy matter, the functionality approach is best suited to

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<sup>7</sup> *NPRM*, ¶ 40.

<sup>8</sup> *See, e.g.*, Comments of the Virginia State Corporation Commission at 11, and Comments of the Public Utilities Commission of Ohio at 26.

<sup>9</sup> *See, e.g.*, Public Service Commission of the State of Missouri at 9.

<sup>10</sup> *Id* at 9.

<sup>11</sup> *Id.*

<sup>12</sup> *NPRM*, ¶ 35.

ensure that consumer expectations are met and protections are available. Moreover, the functionality approach is consistent with the language in the Act and Commission precedent.

The Commission seemed to agree with this approach in its Universal Service Report (Stevens Report) of 1998 where it stated that VoIP services “bear the characteristics” of telecommunications services so long as they satisfy four criteria. First, the service must present itself as providing voice telephony or fax experience. Second, the service does not require the customer to use CPE different from that necessary to hold an ordinary touchtone phone over PSTN. Third, if the service allows the customers to call telephone numbers assigned in accordance with the North America Numbering Plan (NANP). Finally, the system transmits customer information without net change in form or content. The NPSC agrees with the many other state commissions who asserted that treating VoIP as a telecommunications service rather than information service fits within the framework established by the Commission in the Stevens Report.<sup>13</sup>

Furthermore, the precedent of Pulver remains consistent with the NPSC’s recommended method to classify telecommunications service. Pulver subscribers use Session Initiation Protocol (SIP) phone or personal computer to call other members without utilizing the PSTN.<sup>14</sup> Furthermore, unlike traditional telephone, the messages were sent over existing broadband rather than Pulver-owned facilities.<sup>15</sup> In addition, Pulver provides its subscribers with its own numbers without reliance on NANP codes. Thus, the previous ruling in Pulver does not preclude the general classification of VoIP as a telephone service.

Again, the NPSC recommends that the Commission use the following factors as relevant when determining whether a provider is offering telecommunications services:

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<sup>13</sup> See, e.g., Comments of the Virginia State Corporation Commission at 4.

<sup>14</sup> *NPRM*, ¶ 15.

<sup>15</sup> *Id.*

1. Whether the IP-Enabled service is functionally equivalent to traditional telephony.
2. Whether the IP-Enabled service provider advertises or represents its service as telephone service or a replacement service for POTS.
3. Whether the subscriber can or does utilize the IP-Enabled service as a replacement for traditional local exchange service or POTS.
4. Whether the IP-Enabled service provider utilizes traditional NANP-administered telephone numbers.
5. Whether the IP-Enabled service provider utilizes the PSTN in either originating or terminating service.

If one or a combination of the above-listed factors is present, the Commission should conclude that such VoIP services are telecommunications services. Such services should be subject to some state oversight as long as such regulations are competitively neutral and do not present a barrier to competition.

### Universal Service

VoIP providers should equitably contribute to federal and state universal service mechanisms. Exempting VoIP providers would be unfair to other contributing carriers and would place even greater threat on the sufficiency of state and federal funding mechanisms. The NPSC does not believe it would be in the public interest to defer contribution requirements for such providers until such time as the federal universal service fund mechanism is revamped.

### CONCLUSION

The Commission should ensure that there are proper consumer safeguards governing the provision of VoIP services. The Commission should not preempt states' ability to require IP-

Enabled service providers to contribute to state universal service and 911 funding mechanisms, or limit the ability of states to impose consumer protection regulations where necessary. The Commission and states should work together to encourage rapid deployment of IP-Enabled services.

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Respectfully Submitted,

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